



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

February 3, 2003

Mr. Lance Beversdorff
Staff Attorney
Texas Youth Commission
P.O. Box 4260
Austin, Texas 78765

OR2003-0687

Dear Mr. Beversdorff:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175853.

The Texas Youth Commission (the "commission") received three requests for the following information:

Request No.1 (dated 11/6/02): (1) documents pertaining to disciplinary action related to two named commission employees, (2) investigations related to two youths committed to the commission's care, and (3) investigation of requestor's grievance;

Request No. 2 (dated 11/13/02): investigative report pertaining to requestor's demotion and associated probation; and

Request No. 3 (dated 11/14/02): investigation no. 02-0967.

Initially, we note that you did not submit for our review documents pertaining to disciplinary action related to two named commission employees or the investigation of the first requestor's grievance. Further, you have not indicated that such information does not exist or that you wish to withhold any such information from disclosure. Therefore, to the extent information responsive to this aspect of the request exists, we assume that you have released

it to the requestor. If you have not released any such information, you must release it to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302.¹

We next address the commission's failure to comply with section 552.301 of the Act in requesting this letter ruling. Section 552.301 provides, in relevant part, that a governmental body that seeks to withhold requested information from the public must "submit to the attorney general . . . a copy of the specific information requested, or submit representative samples of the information if a voluminous amount of information was requested[.]" Gov't Code § 552.301(e)(1)(D). If a governmental body undertakes to comply with section 552.301(e)(1)(D) by submitting representative samples, the submitted information must be genuinely representative of the requested information as a whole. *See* Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988). If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold that information from the public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982).

In this instance, you advise us that "the category one investigation reports and papers are confidential pursuant to Tex. Family Code § 261.201." Section 261.201(a) of the Family Code makes confidential a report of alleged or suspected abuse or neglect "made under this chapter," the identity of the person making the report, and all "files, reports, communications, and working papers" related to an investigation of child abuse. The submitted records do not reflect that any of these investigations were conducted under section 261.201 of the Family Code.² Based on the significant discrepancy between the responsive information that you describe and the contents of the records that you submitted, we conclude that the submitted

¹The Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

²We note that the commission is an agency authorized to conduct investigations under section 261.201. *See* Fam. Code § 261.105(c).

records do not constitute a representative sample of the responsive information that the commission seeks to withhold. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision No. 497 at 4 (1988). Consequently, to the extent that the submitted records are not genuinely representative of responsive information held by the commission, the commission has failed to comply with section 552.301, and therefore requested information that differs substantially from the submitted records is presumed to be public. Gov't Code § 552.302. In the absence of any opportunity to review the unrepresented information, we are unable to determine whether there is any compelling reason to withhold any of that information from release. Accordingly, section 552.302 requires the release of requested information held by the commission that differs substantially from the submitted information. We have no basis for determining whether information that was not submitted to this office is confidential; thus, we have no choice but to order that information released per section 552.302. If you believe that the information is confidential and may not lawfully be released, you must challenge this ruling in court as outlined below. We caution the commission that chapter 552 of the Government Code makes the release of confidential information a criminal offense. *See* Gov't Code §§ 552.101, .352.

We next note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted information consists of "Final Report[s] of Investigation." Thus, this information must be released under section 552.022(a)(1) unless it is expressly confidential under other law or excepted from disclosure under section 552.108.³ Because you claim that the remaining requested information is confidential by law, and thus is excepted from disclosure under section 552.101 of the Government Code, we will consider your claim.

³Because you do not raise section 552.108, we do not consider the applicability of this exception.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You contend that the submitted information is confidential under section 61.073 of the Human Resources Code. Section 61.073 provides:

The commission shall keep written records of all examinations and conclusions based on them and of all orders concerning the disposition or treatment of each child subject to its control. Except as provided by Section 61.093(c), these records are not public and are available only according to the provisions of Section 58.005, Family Code, and Chapter 61, Code of Criminal Procedure.

Section 58.005(a) of the Family Code provides that "[i]nformation obtained for the purpose of diagnosis, examination, evaluation, or treatment . . . of a child by [an agency] providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court" may only be disclosed to only certain individuals under certain circumstances. Upon review of the documents at issue, we determine that the documents are not records of the examination of a student in the custody of the commission, or orders concerning the disposition or treatment of a student in the custody of the commission. Therefore, we determine section 61.073 does not apply to the information at issue. Accordingly, the submitted investigation reports cannot be withheld under section 552.101 of the Government Code in conjunction with section 61.073 of the Human Resources Code.

However, we note that section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) it contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) it is not of legitimate concern to the public. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. Based on our review of the information at issue, we find that the names and identifying information of the juvenile offenders contained in the submitted documents are protected from disclosure under

the common-law right to privacy. Accordingly, we conclude that the commission must withhold the yellow highlighted information in the submitted documents pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. *Cf.* Fam. Code § 58.007; *see also* Open Records Decision No. 394 (1983).

Finally, you claim that the submitted information contains medical records that are confidential under the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code §§ 159.002 (b), (c). Based upon our review of the submitted documents, however, we find that they do not contain a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician. Therefore, the MPA does not apply to the submitted records.

In sum, the commission must withhold the yellow highlighted information in the submitted documents pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. The remaining submitted information must be released to the requestors.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the

governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

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§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cindy Nettles", written in a cursive style.

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 175853

Enc. Submitted documents

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